

No. 47814-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Scott Johnson,**

Appellant.

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Cowlitz County Superior Court Cause No. 15-1-00314-1

The Honorable Judge Michael H. Evans

**Appellant's Opening Brief**

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### **ISSUES AND ASSIGNMENTS OF ERROR**

1. Mr. Johnson was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel unreasonably introduced inadmissible hearsay implicating Mr. Johnson.
3. Defense counsel unreasonably introduced the strongest evidence of Mr. Johnson's guilt.

**ISSUE 1:** Was Mr. Johnson denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

4. The court erred by scoring Mr. Johnson's convictions separately at sentencing.
5. Mr. Johnson's two convictions for possession comprised the same criminal conduct, because the two concurrent counts involved simultaneous acts of simple possession.
6. The trial court erred by sentencing Mr. Johnson with an offender score of ten.

**ISSUE 2:** Did the trial court err by scoring Mr. Johnson's two convictions separately, where they involved simultaneous acts of simple possession?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Police got a search warrant for Scott Johnson's home, searching for evidence of drug distribution and Mr. Johnson himself. RP 39. When they served the warrant, they found Mr. Johnson, but not evidence of drug distribution. RP 61,

There were at least eight people in the house when police entered. RP 43, 69-70, 74, 95. Upon entering a bedroom, officers found Mr. Johnson, Jessica Demoss, and another woman. RP 69, 102. Two officers said that Mr. Johnson was reaching down, as if to grab or hide something, into a cluttered area near the bed. RP 62, 103.

Jacquelyn Croseman worked at the prosecutor's office as part of a work-study program. RP 75. She was in the house when police came, and her purse was near the nightstand on the floor in Mr. Johnson's bedroom. RP 67, 70-72. When officers searched inside the purse, they found foil with heroin residue. RP 67, 104. At least one of the officers conducting the search recognized her. RP 85, 91. Croseman agreed to allow her purse to be searched, stating nothing would be found in it. RP 121.

Police also found methamphetamine on a nightstand.<sup>1</sup> RP 67. Mr. Johnson acknowledged the room was his bedroom, but denied that the items in the purse and on the table were his. RP 65.

Demoss and Mr. Johnson were arrested for possession. RP 75, 119. Croseman was not arrested or charged with the contents of her purse. RP 75. The state charged Mr. Johnson with possession of heroin and possession of methamphetamine. CP 1.

At trial, the state did not call any of the occupants of the house. RP 49-142. During cross-examination of the arresting officer, the defense sought to cast doubt on the allegation that Mr. Johnson was reaching to the purse to hide heroin. RP 69-76. He brought out Croseman's employment at the prosecutor's office, noted that she wasn't arrested, and also emphasized the large number of people found in the house. RP 69-76.

Then the defense attorney asked the officer if he had asked Croseman about the contents of her purse. RP 76. Detective Libbey's report contained no information about any statements made by Croseman. RP 80. The defense attorney continued, asking what Croseman said:

Q. And what did she say?

A. She said, "No, it belonged to Mr. Johnson."

Q. And how would she know that the heroin was in her purse?

A. Well, she told me that she was in the room prior --

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<sup>1</sup> Police located scales, but did not testify about their exact location. RP 88.

Q. Okay.

A. And observed interactions with --

Q. That's all -- that's all the questions I have.

RP 76.

Crosetman had not been called as a witness. RP 49-142. And her unreported statement to the officer was not brought in by the state. RP 49-69. During redirect, the prosecutor had the officer reiterate the statement:

Q. What did she indicate about Mr. Johnson and that heroin that was later found in her purse?

A. She had stated that she'd seen him with -- seen him with what -- well, and I didn't show her the specific heroin, but the heroin the room she had seen him with prior to our arrival there.

RP 77.

Another officer said he did talk to Crosetman, that she denied knowing that anything would be found in her purse, and that she said the foil with heroin they did find was not hers. RP 121-122. This officer said that Crosetman did not say anything about the heroin belonging to Mr. Johnson. RP 122.

The prosecutor highlighted the hearsay statement brought out by the defense attorney during closing argument. RP 163-170, 181-184. He repeated what the first officer said Crosetman said, about seeing Mr. Johnson put the heroin into the purse. RP 163-170. The state urged the jury to find that Crosetman's hearsay statement amounted to proof of actual possession. RP 168-169, 183.



The jury found Mr. Johnson guilty as charged. RP 190. At sentencing, Mr. Johnson's attorney told the court that the defense agreed with the state's calculation of offender score. RP 200. No one at the sentencing hearing made any reference to whether or not the two simultaneous drug offenses should count as the same or separate criminal conduct. RP 200-205. The court signed a Judgment and Sentence that indicated each offense counted separately. CP 23-34.

Mr. Johnson timely appealed. CP 35-47.

## **ARGUMENT**

### **I. MR. JOHNSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY INTRODUCED INADMISSIBLE EVIDENCE OF HIS GUILT.<sup>2</sup>**

A conviction must be reversed for ineffective assistance if counsel's deficient performance at trial prejudiced the accused person.<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Mr. Johnson's possession convictions must be reversed because his attorney unreasonably introduced the strongest evidence of his guilt.

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<sup>2</sup> The Sixth Amendment right to the effective assistance of counsel is applicable to the states through the Fourteenth Amendment. U.S. Const. Amends. VI and XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

<sup>3</sup> Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

Possession may be actual or constructive. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Constructive possession “is the exercise of dominion and control over an item.” *State v. Enlow*, 143 Wn. App. 463, 468, 178 P.3d 366 (2008). Constructive possession is established “by viewing the totality of the circumstances.” *Id.*

Here, the state bore the burden of proving that Mr. Johnson possessed the heroin found in Croseman’s purse. The state did not call Croseman to testify. Defense counsel severely damaged Mr. Johnson’s chances at acquittal by introducing Croseman’s out-of-court statements to Detective Libbey. RP 75-77.

Croseman’s hearsay accusation—that the heroin “‘belonged to Mr. Johnson’” – was the strongest proof that Mr. Johnson possessed the drug. RP 76. Because it was hearsay, it would have been excluded had the state attempted to introduce it. ER 801; ER 802. The prosecutor did not try to present her statements on direct. After defense counsel inadvertently opened the door to the evidence, the prosecutor followed up immediately by establishing that Croseman had seen Mr. Johnson with the heroin in the room just before the police showed up. RP 77.

Defense counsel apparently failed to interview the officer prior to cross-examination. This is suggested by the fact that counsel halted his cross-examination as soon as he’d elicited the damaging information, and then—

after the prosecutor took advantage of the error—established on re-cross-examination that Libbey’s report didn’t mention the officer’s conversation with Croseman. RP 79-80.

This failure to investigate also deprived Mr. Johnson of the effective assistance of counsel. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Strategic choices made after less-than-complete investigation are unreasonable *See State v. A.N.J.*, 168 Wn.2d 91, 111-112, 225 P.3d 956 (2010). Having failed to interview Libbey, counsel was in no position to properly represent Mr. Johnson. *A.N.J.*, 168 Wn.2d at 111-112.

Defense counsel’s deficient performance prejudiced Mr. Johnson. First, counsel’s error provided the strongest evidence that Mr. Johnson had dominion control over the heroin in Croseman’s purse. Second, the error likely strengthened the jury’s belief that the nearby methamphetamine also belonged to Mr. Johnson.

Mr. Johnson was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *A.N.J.*, 168 Wn.2d at 111-112. His convictions must be reversed and the case remanded for a new trial. *A.N.J.*, 168 Wn.2d 91.

**II. THE TRIAL COURT IMPROPERLY SENTENCED MR. JOHNSON WITH AN OFFENDER SCORE OF TEN.**

- A. Mr. Johnson's current offenses should not have scored against each other.

Mr. Johnson's current offenses comprised the same criminal conduct. This is so because "concurrent counts involving simultaneous simple possession of more than one controlled substance encompass the same criminal conduct for sentencing purposes." *State v. Vike*, 125 Wn.2d 407, 412-13, 885 P.2d 824 (1994). Thus, as a matter of law, the two offenses should not have scored against each other. RCW 9.94A.589(1)(a).

The trial judge erred by sentencing Mr. Johnson with an offender score of ten.<sup>4</sup> *Id.* The case must be remanded to the superior court for correction of the offender score.<sup>5</sup> *Id.*

- B. Mr. Johnson's attorney provided ineffective assistance by failing to argue that his two offenses comprised the same criminal conduct for sentencing purposes.

An accused person has a right to the effective assistance of counsel at sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). Defense counsel provides ineffective assistance by

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<sup>4</sup> Although counsel stipulated to the offender score, stipulation to an error of law is not binding on the court. *State v. Drum*, 168 Wn.2d 23, 33, 225 P.3d 237 (2010).

failing to argue same criminal conduct when warranted. *State v. Phuong*, 174 Wn. App. 494, 548, 299 P.3d 37 (2013).

As outlined above, Mr. Johnson's two convictions should have been counted as the same criminal conduct for sentencing purposes. *Vike*, 125 Wn.2d at 412-13. Instead of making a same criminal conduct argument, counsel stipulated to the state's calculation of his offender score. RP 200. Counsel provided ineffective assistance by stipulating to an improperly-calculated offender score. *Phuong*, 174 Wn. App. at 548. Mr. Johnson's case must be remanded for correction of the offender score. *Id.*

### **CONCLUSION**

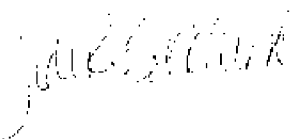
For the foregoing reasons, Mr. Johnson's convictions must be reversed and the case remanded for a new trial. In the alternative, the case must be remanded for correction of the offender score.

Respectfully submitted on January 14, 2016,

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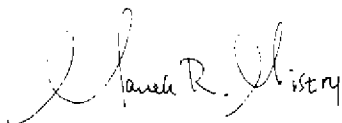
<sup>5</sup> As the *Vike* court noted, the issue is not moot even though it will not affect Mr. Johnson's sentence. *Id.*, at 409 n. 2.

**BACKLUND AND MISTRY**

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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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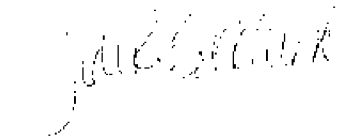
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 14, 2016.



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## BACKLUND & MISTRY

**January 14, 2016 - 3:30 PM**

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